Women, Human Rights, and the Constitution

for the Canadian Advisory
Council on the Status of
Women - August 1980
(revised October 1980)

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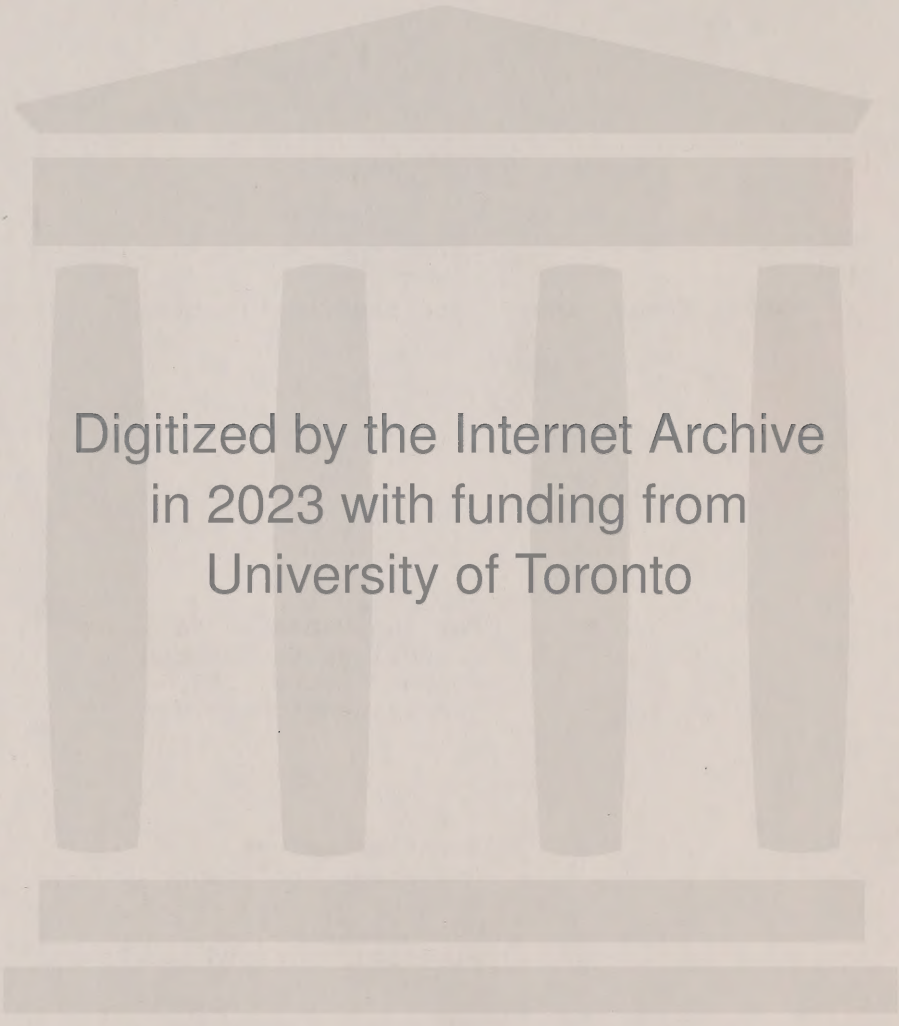

The current constitutional debate presents an opportunity to reconsider our human rights. The lack of an immediate threat to those rights may leave us more complacent than we should be. Unfortunately, discussions about human rights can seem intimidating if people feel constrained by a lack of knowledge about the issues. In this paper, I propose to provide the information and analysis which I consider pertinent to a discussion of the human rights of women in the context of a new Canadian constitution. I believe that this information will shatter any tendency toward complacency.

The first step in considering human rights is to delineate the boundaries of the discussion. A "right" is any claim which is protected by law. The phrase "human rights" will be used to designate those claims which people make against the state by virtue of their membership in the state. There are other terms such as "civil liberties" or "fundamental freedoms and rights" which might be used interchangeably with "human rights". Generally speaking, these terms focus on the distinction between what a citizen is entitled to do or not do and what a government can do or not do. If the normal function of government is to make and enforce rules; then a human, or citizen's, right imposes limitations on that rule-making ability. There is nevertheless a wide variety of expectations about what those limitations should be.

One way to illustrate the breadth of such expectations is to refer to the ways in which human rights have been legislated in Canada. There are four statutes in Canada in which the essential, or one of the essential, purposes is to serve as the basis for the claims which people can make against the state by virtue of their membership in the state. They are the Canadian[1] and Alberta Bills of Rights,[2] and certain sections of the Quebec Charter of Human Rights and Freedoms[3] and The Saskatchewan Human Rights Code[4]. The two Bills of Rights provide for similar types of claims which can be classified under four headings: political rights - the freedoms of religion, speech, assembly, association, and press; legal rights - the right not to be deprived of life, liberty and security of the person except by due process of law[5]; egalitarian rights - the right to equality before the law without discrimination by reason of race, national origin, colour, religion, or sex; and economic or property rights - the right not to be deprived of the enjoyment of property except by due process of law. The Saskatchewan Human Rights Code provides for the freedoms of conscience, expression, and association; the freedom from arbitrary arrest; and the right to the franchise at least every five years. The Quebec Charter of Human Rights and Freedoms is probably the most innovative with provision for such rights as the right to assistance if a person's life is in peril; the right to the safeguard of a person's dignity, honour and reputation; the right to respect for a person's private life; the right to nondisclosure of confidential information; the right

of every child to protection, security and attention by his or her family; the right, with some qualifications to free public education; and so on.

The Manitoba Law Reform Commission has proposed a bill of rights for Manitoba that contains provisions similar to the Canadian and Alberta Bills of Rights supplemented by provisions for the right to vote and be a candidate for public office, the right of ethnic or linguistic groups to enjoy and promote their own culture and language (Quebec has a similar provision), and the right of reasonable access to all public information.[6] Since the Second Constitutional Conference in 1969, the federal government has proposed the inclusion of language rights in any new Charter of Human Rights.[7] In the 1978 Constitutional Amendment Bill the federal government supplemented freedom of religion with thought and conscience, and changed freedom of speech to freedom of opinion and expression. Both in 1978 and in the July 1980 draft of the Canadian Charter of Rights and Freedoms, the federal government proposed to create "mobility rights" including the right to pursue a livelihood in any province or territory.

All of these existing and proposed human rights are relevant to women. Many do, and will, serve as the basis for our claims for protection against governmental actions. However, one of these human rights is particularly important when women have to make claims based on the fact that they are women. Historically our legal system has treated women differently from men, with its treatment of men constituting the norm for legal personality.

The goal of feminist claims is to ensure that women are treated as persons. The claim for legal personhood made by women is based on the principle which, in the words of the Royal Commission on the Status of Women,

> "...emphasizes the common status of women and men rather than a separate status for each sex."[8]

When expressed in traditional human rights terminology, the convention has arisen that women's claims for personhood are treated as claims for equality. The equality approach is based on female to male comparisons. There is always the risk that comparison will not produce a concept of legal personhood which is founded on the Royal Commission's principle of a common status of men and women. However, it is probably less feasible to propose a new approach which inevitably would have to contain details of the projected new common personhood status if it were to be substituted successfully for equality. It is more difficult to design and to implement a perfect system than to work within the existing framework. The equality approach could produce more immediate results, which hopefully would serve as the basis for an acceptable, if not utopian, personhood.

The women's human right to equality has some weak antecedents in the British and Canadian common law tradition. In one of the earliest British cases[9], the court held that where a township contained only three houses, the inhabitants of all three could be appointed overseers of the poor, notwithstanding that two of them were labourers and relatively poor, and one was a woman. Five reasons were given for accepting the appointment of the woman, Alice Stubbs. These reasons were directed as

much at precluding similar claims as at justifying this appointment. First, Alice Stubbs, as a widow whose estate occupied the greatest part of land in the township, was a substantial landholder and therefore met the qualifications to be an overseer of the poor. Second, the position of overseer was not an "office of a higher nature". Third, the appointment was only for one year. Fourth, there was no danger that the appointment of a woman would become a common practice because judges had the discretion to refuse to make such appointments. Finally, it was necessary to appoint Alice Stubbs to the third overseer position because, aside from the other two appointees, there were no men in the parish qualified to fill the position.

From the time of this decision in 1788 until 1929 the British courts, when asked, consistently refused to allow women to vote in various electoral constituencies[10], to hold elected or appointed public offices[11], and to enter into training for various professional occupations[12], especially the legal ones. In many of these cases the women's claims were based on statutes which provided that "persons" were entitled to participate in the various activities. The grounds used by the courts for exclusion from personhood were expressed in terms of women's legal incapacity at common law to undertake public life, an incapacity which could only be removed by the most explicit legislative provisions. The use of the word "person" in legislation was not considered explicit enough to overcome their common law incapacity.

Since there were only two classifications at issue -

the haves and the have-nots - equality terminology can be superimposed on these "persons" decisions without distortion. This was recognized as early as 1868 when Mr. Justice Willes referred to women's separate but allegedly equal status:

> ...women are under a legal incapacity to vote at elections. What was the cause of it, it is not necessary to go into: but, admitting that fickleness of judgment and liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex either in point of intellect or worth. That would be quite inconsistent with one of the glories of our civilization, - the respect and honour in which women are held.[13]

The impotence of this separate but equal status was demonstrated only five years later when Sophia Jex-Blake and nine other women brought an action against the Senate of the University of Edinburgh.[14] The women had been admitted to medical studies at the university with the provision that they were to attend special classes separate from the male students. However some of the professors refused to teach separate classes. When the eight man court divided four to four on the women's claim, four more judges were added to the bench. Thus a total of seven judges was found to deny that the women were entitled to complete their medical studies even in segregated classes. They dispelled the notion that a separate status for women could be seen as an equal status.

In Canada,courts in New Brunswick, Quebec, and British Columbia refused to order the admission of women to the study and practice of law.[15] In 1917 Lizzie Cyr of Calgary appealed her conviction for vagrancy on the ground that the convicting police magistrate, Alice Jamieson was a woman and thereby incapacitated from holding that position.[16] The appellant argued that the statute under which Alice Jamieson was appointed did not directly declare that women were eligible to be police magistrates; therefore she was incapacitated from holding that position according to the common law tradition.

Mr. Justice Stuart of the Alberta Supreme Court reached back one hundred and twenty nine years to the Alice Stubbs case to hold that Alice Jamieson was not incapacitated. He reasoned that the Alice Stubbs case was the last case about a woman holding public office that was decided on general common law principles. All of the subsequent cases could be distinguished because their decisions were based on the interpretation of words, such as "person" or "man", in the pertinent statutes. Insofar as those cases referred to the common law, the references were not binding because they were incidental to the real basis for the decisions. Furthermore, he doubted that there was any decision that laid down as an absolute general rule that under the English common law a woman was disqualified from holding public office. This enabled him to conclude

> ...that applying the general principle upon which the common law rests, namely, that of reason and good sense as applied to new conditions, this Court ought to declare that in this Province, and

> at this time in our presently existing conditions, there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex.[17]

Mr. Justice Stuart's decision is significant for two reasons. First, it provides an illustration of creative judicial decision-making in the context of women's rights that is unparalleled in any subsequent Canadian decisions. Secondly, it raises the question whether the women's human right to equality would be better protected if left to the common law rather than codified. Unfortunately, history seems to weigh against reliance on the common law tradition as a source for women's rights. It is obvious that the number of earlier decisions rejecting women's claims far outweighed those supporting women. The significance of the Cyr decision has been diminished by the fact that it was not even mentioned in the next Canadian case, the "Persons Case".

When interpreting the word "persons" in section 24 of The British North America Act, the Supreme Court of Canada followed the traditional British precedent that women were under a legal incapacity which the word "persons" could not overcome.[18] The Judicial Committee of the Privy Council[19] overruled the Supreme Court of Canada on the ground that the word "persons" was sufficiently ambiguous that it could, and did, include women when the surrounding circumstances favoured that interpretation. Since the determinative circumstance was the constitutional significance of The British North America Act, the decision may

not sustain support for reliance on the common law tradition in cases involving ordinary legislation.[20]

When assessing the value of the common law tradition, it is worth noting that the combined record of the Supreme Court of Canada and the Judicial Committee of the Privy Council showed at best ambivalence in deciding cases that today would be viewed as raising parallel claims for racial or ethnic equality. In 1899 the Judicial Committee of the Privy Council held that a British Columbia statute prohibiting women, children, and Chinese men from working underground in mines was ultra vires insofar as it related to Chinese men.[21] (The exclusion of women was not challenged and therefore prevailed.) The Judicial Committee decided that the legislation was really directed towards those Chinese men who were either aliens or naturalized subjects. Thus only the federal government could enact the legislation under the division of powers set out in the British North America Act. The court expressly stated that it had no right to consider whether prohibiting Chinese mine workers was a wise exercise of legislative jurisdiction. Therefore, although the effect of the decision was that Chinese men could continue to be employed in mines, they would not be able to look to the court for protection of their right not to be subject to discrimination. If the proper jurisdiction passed a discriminatory law, presumably it would stand. Thus, four years later the Judicial Committee held that British Columbia could deny the right to vote to men who were Chinese, Japanese or Indian.[22] (In 1902 women could not vote.) Not surprisingly the Judicial Committee reiterated the

view that it was not entitled to consider "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise."[23]

In 1914 the Supreme Court of Canada followed the decisions of the Judicial Committee in holding that it was within the jurisdiction of the Saskatchewan government to pass a statute that prohibited Chinese men from employing white women.[24] Although each judge referred to the racial nature of the legislation; all used the division of powers approach as the basis for deciding to uphold the statute.

It was not until 1940 that a racial case was decided by the Supreme Court of Canada on grounds other than the federal-provincial division of powers.[25] The case involved a black man who was denied service in a Quebec tavern on the ground of his colour. The Court dismissed his claim for damages by referring to the general principle of freedom of commerce. This meant that any merchant was free to deal as he might choose with any individual member of the public. The effect of this decision was as devastating for the human right to equality as the earlier division of powers approach had been. It meant that discrimination on the ground of race could exist because freedom of commerce was to prevail.

In 1951 the Supreme Court of Canada did place a limited restriction on freedom of commerce when it decided that a restrictive covenant prohibiting the sale of land to Jews and blacks was unenforceable because it did not involve the use of the land.[26] The judges did not express any opinion about the

discriminatory effect of the restrictive covenant.

The existence of these five racial or ethnic equality cases, by their omissions, reinforces the conclusion of the women's rights cases that the common law tradition provides little support for such claims. The highest courts in Canadian decision-making, by their words, do not establish themselves as proponents of egalitarian values. In fact the "Persons Case", by openly referring to the history and effects of distinctions based on sex, came closer to acknowledging egalitarian values than any of the other cases with the possible exception of the dissenting judge in the 1914 Saskatchewan decision. However, the outcome in that Saskatchewan decision was the antithesis of equality.

The lesson to be learned is the absolute necessity of effectively worded legislation if women expect legal protection of their human right to equality. Even if the Supreme Court of Canada were to approve the very recent decision of the Ontario Court of Appeal by Madame Justice Bertha Wilson that there is a common law right not to be discriminated against on the grounds of ethnic origin,[27] women would not be assured the same right. Furthermore, if a common law right against discrimination on the ground of sex were to be sustained, it does not necessarily follow that it would have the status of a human right, that is, a claim against the government. In Bhadauria, the Ontario Court of Appeal was asked only whether the right existed in an employment situation. For now, the significance of the court's answer lies in the fact of recognition rather than in the specifics of what was recognized.

During the last thirty years in Canada, right to equality provisions for women and for other groups have been enacted primarily in bills of rights and human rights codes. This right is set out in the Canadian and Alberta Bills of Rights as "the right of the individual to equality before the law and the protection of the law...without discrimination by reason of race, national origin, colour, religion or sex". There is no equivalent provision in The Saskatchewan Human Rights Code. The preamble to the Quebec Charter of Human Rights and Freedoms contains a reference to the "equal protection of the law", but as a preamble it may not have the same protective impact as the other independent statutory provisions. Moreover, there is no specific reference to sex as a proscribed classification.[28] In the remaining provinces which have not legislated the right to equality, the only recourse for women would be to the common law tradition, the limitations of which have been discussed above, or to international law which introduces new complexities, not the least of which includes a lack of effective sanctions.

Since all of the provinces and the federal government have enacted legislation which in nine of the eleven jurisdictions are called "Human Rights" codes or acts (in Alberta, The Individual's Rights Protection Act; and in Quebec, the Charter of Human Rights and Freedoms), I will label these as "conventional" human rights codes to distinguish them from the kind of human rights provisions defined as the focus of this report, which I will call the "fundamental" human rights provisions. The conventional human rights codes enacted by all

eleven jurisdictions, despite their variations, exist to forbid discriminatory practices in selected relationships, such as between employer or employee, between tenants and lessors, between advertisers and the public, and so on. Obviously, conventional human rights codes are important because they regulate our everyday relationships with other people (including the government when it is acting as employer, lessor, advertiser, etc.). However, they do not deal with issues of the same magnitude as those raised when we claim our fundamental human right to equality against government. If an individual feels powerless in a fight with an employer or a lessor, that is, in voluntary relationships; this sense of vulnerability is even greater when the fight is the fundamental one of asserting our rights as citizens against a government, which by its very nature is expected to exercise control over people.

There is a second important distinction between fundamental and conventional human rights legislation. Conventional human rights codes generally adopt non-discrimination terminology in contrast with the equality terminology of fundamental human rights legislation. In theory, both approaches have the same objective, the promotion of equality. However, in some cases the discrimination terminology of conventional human rights codes has been so narrowly interpreted by the courts that it is impossible to understand how equality has been promoted.

A case in point is the decision by the Ontario Court of Appeal that the Ontario Rural Softball Association had not

offended the Ontario Human Rights Code when it refused to allow Debbie Bazso to play baseball.[29] If Ontario had provided for the women's fundamental human right to equality, it would have been possible to use it as the basis for challenging the court's decision and the Ontario Human Rights Code provision. However, since Ontario does not provide for the women's fundamental human right to equality, the legislature of Ontario cannot be compelled to revise the words of the Ontario Human Rights Code to ensure the inclusion of sports programs and facilities provided in public parks and arenas as Madame Justice Bertha Wilson had argued in her dissenting opinion in the Bazso case.

Unfortunately, the discrimination terminology of conventional human rights legislation, narrowly interpreted, also has been used to strike down two affirmative action programs in Alberta. A University of Calgary special program for native students was challenged by a non-native woman who had been refused admission to the program.[30] In the second case the Athabasca Tribal Council sought to make it a condition of the Energy Resources Conservation Board's approval of a new tar sands development that a special employment program for native people be established.[31] In both cases the affirmative action programs were held to have violated the non-discrimination provisions of The Individual's Rights Protection Act. The Alberta Court of Appeal said that:

> ...the establishment of affirmative action programs would require amendments to the Individual's

Rights Protection Act similar to those in a number of other provinces expressly exempting such programs from the operation of the statute.[32]

Alberta[33], Newfoundland[34], and Quebec[35] are the three jurisdictions which have not provided in their legislation for affirmative action programs. Since these decisions, Alberta has introduced an amendment which would allow Cabinet approval of such programs.[36] The remaining eight jurisdictions have legislated their approvals in their conventional human rights codes in a variety of ways. Five of those provinces - British Columbia[37], Saskatchewan[38], New Brunswick[39], Prince Edward Island[40], and Nova Scotia[41] - and the federal government[42] have specifically stated in their legislation that affirmative action programs, if approved, cannot be construed as discriminatory.

It is debatable, however, whether this type of legislation is sufficient to withstand challenge. A conventional human human rights code which contains both non-discrimination provisions and an affirmative action provision communicates both the negative instruction - do not discriminate with respect to sex - and the positive instruction - discriminate with respect to sex. At least one of the conventional codes is expressed in this kind of converse language.[43]

Other conventional human rights codes have attempted to resolve this ambiguity by permitting affirmative action programs for "disadvantaged" groups.[44] If a group is defined as

disadvantaged, discrimination is permissible to "even-up" the group's status in society. Therefore, the justification for affirmative action is the promotion of equality. It is equality which is sufficiently comprehensive that it encompasses both prohibition of discrimination and permission for affirmative action. However, this equality justification is speculative until or unless the legislatures and/or the courts approve it. In view of their past records in human rights, it is likely that the higher courts would be reluctant to define equality. Then, given the ambiguity of the negative and positive instructions, the most comfortable judicial resolution might be to prefer the more familiar non-discrimination approach with the consequence that most of the effective types of affirmative action programs would be defeated. In this event, the only instruction which the legislators might give successfully to intransigent courts would have to take the form of legislating the women's human right to equality so that it could serve as an explicit authorization of both the negative and positive discrimination instructions in conventional human rights codes.

Another argument used to challenge affirmative action programs would accept the decision of Ontario Court of Appeal judge Bertha Wilson that there is a common law right not to be subject to discrimination[45] and would extend this right to include sex discrimination. Again, such a non-discrimination right could be construed narrowly as exclusive of affirmative

action programs. Then the question is whether this common law right of non-discrimination could be altered by legislating the more general fundamental human right to equality. On balance, it is probably more likely that the higher courts, traditionally so predisposed to defer to the legislature on questions of human rights, might accept a legislated definition of equality provided that the legislature underlined the significance of its intention by making the right fundamental.

At this point it is relevant to acknowledge the fact that Alberta is one of the two Canadian jurisdictions that has expressly legislated the provision for equality before the law without discrimination by reason of sex in its Bill of Rights. Yet it was an Alberta court which denied that affirmative action programs were acceptable. There is no indication that the equality before the law clause of the Bill of Rights was argued in either case. Both cases were seen as challenges under The Individual's Rights Protection Act. Moreover, if the Bill of Rights equality provision had been argued, it might not have sustained the affirmative action programs. The American courts have wrestled with the equivalent problem without producing a majority opinion as to whether the affirmative action provisions in their Civil Rights Act violate their Bill of Rights equal protection of the law clause. Since the American Supreme Court has evaded this ruling for over a decade, it would not be surprising for the Supreme Court of Canada to adopt the same approach when confronted with this issue.

Women, whose interests lie in supporting affirmative action programs, may have to bear the cost of litigation either to procure or to uphold them. Therefore, they should seek the best protection possible, that is, legislation defining their fundamental human right to equality as including both positive and negative instructions about discrimination.

In sum, the common law is not a reliable source of the women's human right to equality. Conventional human rights legislation, containing both non-discrimination and affirmative action provisions, is best safeguarded by the existence of a comprehensive and fundamental human right to equality. Therefore, the next question is whether our present equality before the law clause can meet these requirements. The simple answer is that it does not.

In 1960, during House committee discussion of the clause respecting equality before the law without discrimination by reason of sex[46] in the Canadian Bill of Rights, the then Minister of Justice Davie Fulton expressed the view that men and women were different, not equal.[47] Although Canadian courts are not supposed to consider statements made by legislators when statutes are being passed, it is not hard to agree with Mary Eberts' conclusion that "This was not, however, a very auspicious beginning for a term that was soon to be used to attach incidents of the status of womanhood."[48]

The real test of the meaning and value of statutory statements of human rights arises when the courts, in particular the Supreme Court of Canada, the final court of appeal, are asked to apply them to actual confrontations between claimants

and a government which in the case of the Canadian Bill of Rights is restricted to the jurisdiction of the federal government. If the court will not sustain the human right, then the statutory statement is without value. For women, the existence of the sex equality clause has engendered expectations of equality which have not been supported by the Supreme Court of Canada. The Supreme Court does not have a record of favouring the litigant who argues that an alleged inequality violates the equality before the law clause, not only in the sex equality cases, but also in the general equality cases.

During the seventies the Supreme Court of Canada delivered ten judgments which involved their interpretation of the equality before the law clause of the Canadian Bill of Rights. Two of these cases alleged inequalities by reason of sex (Lavell[49] and Bliss[50]); two, by reason of race (Drybones[51] and Canard[52]); and the remaining six (Smythe[53], Curr[54], Burnshine[55], Prata[56], Morgentaler[57], and Hatchwell[58]) alleged inequalities based on grounds other than the proscribed categories contained in the non-discrimination clause.

Of these ten cases, only one, Drybones, resulted in the decision that there was an inequality created by the federal statute. In that case, the section of the Indian Act which made it an offence for Indians to be intoxicated off a reserve was held to be inoperative. Mr. Justice Ritchie concluded his opinion by narrowly circumscribing the reason for his decision as follows:

> It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the Indian Act.[59]

The remaining nine decisions were decided after Drybones and in every case the Supreme Court of Canada denied that inequality existed. From the viewpoint of the persons alleging the inequalities from which they expect to be protected, this record is dismal. If these cases are seen as appropriate vehicles for the assertion of the human right to equality, then the dismal record in equality litigation must derive from inadequacies either of the Supreme Court of Canada or of the wording of the Canadian Bill of Rights equality before the law clause, or of both, relative to what is expected of them.

Both race and sex are characteristics which, with a very few exceptions, are permanently ascribed at birth. As such, these involuntary characteristics should not serve as the basis for making distinctions among people when the law is being used to distribute the benefits and burdens of living in Canada. The Canadian Bill of Rights has recognized this invidiousness by proscribing race, sex, religion, colour, and national origin, in the non-discrimination clause which introduces the various human rights clauses. Therefore, the race and sex cases were

appropriate vehicles for raising inequality questions. Furthermore, it was analytically appropriate to raise the inequality issue in the race cases because they involved the comparison between the two classifications, Indians and non-Indians, the totality of which constituted the whole category of persons who might legally be punished for being intoxicated or might legally be permitted to administer a deceased's estate in Canada. Similarly inequality was an appropriate issue in the Lavell and Bliss cases because sex is the paradigm category containing as it does, only two classifications.

Six cases dealt with categories which were not proscribed. Since most laws only apply to some people - consumers, automobile drivers, and so on - it is normal for legislation to use categories or classifications. When the Supreme Court of Canada has to decide whether some categories are invidious or acceptable it has no standards on which to base that conclusion, other than the race, national origin, colour, religion, or sex proscriptions in the non-discrimination clause. Perhaps the court should have refused to look beyond these proscribed categories; however, it has not accepted that limitation. Unfortunately, the consequence of extending the reach of the equality before the law clause to categories other than the proscribed ones is that the court has then detrimentally applied the tests for invidiousness which it used in those cases to the cases involving race and sex. In fact the process should have been reversed. By virtue of their legislated status the race and sex cases should have been analyzed to provide the standards for

invidiousness required in the non-proscribed categories.

Without legislative standards, it is impossible to state conclusively whether it was appropriate to allege inequality in the six cases. Since they raise such a significantly different initial issue - the standard for ascribing invidiousness - from the race and sex cases which derive their invidiousness from the non-discrimination clause, consideration of the six should be restricted.

Assuming, therefore, that the race and sex cases were appropriate vehicles for the assertion of the human right to equality; the dismal record remains. In both of the sex cases and in one of the two race cases, the women who went to the Supreme Court of Canada expected that the equality before the law clause of the Canadian Bill of Rights would protect their human right to equality. Their expectations were denied. Is there a relationship between those denials and the composition of the Supreme Court of Canada bench?

Since its origin in 1875, there has been an absolute male preference in the fifty-nine appointments which have been made. The first woman in the British Empire to be admitted to the practice of law was Clara Brett Martin in Ontario in 1897. Since that time no woman lawyer has been appointed to the Supreme Court of Canada. In February, 1970, the Royal Commission on the Status of Women recommended "that the federal government name more women judges to all courts within its jurisdiction."[60] Since this recommendation was made, there have been eight men appointed by the federal government to the Supreme Court of

Canada. In the face of such intransigence, the only effective alternative is to demand legislation providing for the appointment of women to the Supreme Court of Canada.

Legislating the appointment of women judges to the Supreme Court of Canada is comparable with the present practice of appointing francophones to three out of the nine positions. The federal government's proposed Constitutional Amendment Bill, 1978, provided for an eleven member Supreme Court of Canada bench, four of whom would have been appointed from Quebec.[61] This was justified in terms of the importance of ensuring that questions relating to the civil law of Quebec were determined by judges trained in that law. If judges who are not admitted to the bar of Quebec may lack the requisite skill and expertise required to decide civil law cases; can it not also be argued that male judges may lack what Paul Weiler has called "the essential trait of judicial attitude" namely, "impartial and impersonal judgment",[62] when deciding cases where sex inequality has been alleged by women?

There are two reasons why men may lack impartiality in sex equality cases. First, the men never experience the deprivations from "personhood" which women face during their lifetime. Nor is it sufficient for a male judge to experience vicariously the deprivations of the women with whom he is intimate. The distance between being and perceiving can never be completely bridged even by the most sympathetic male judge.

A study of American cases carried out in 1971 by two middle-aged, white,male,law professors (their own self-charac-

terization) is a case in point.[63] They analyzed a representative selection of American judicial opinions in which the judges were responding to allegations of sex discrimination. Their conclusion was that the performance of American judges in sex discrimination decisions ranged "from poor to abominable".[64] The judges "failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues."[65] The authors found particularly noteworthy the contrast between judicial attitudes in the sex discrimination cases and those in the race discrimination cases. They reported that:

> Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist" - at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on color. With respect to sex discrimination, however, the story is different. "Sexism" - the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences - is as easily discernible in contemporary judicial opinions as racism ever was.[66]

Then the American study proceeded to offer "intuitive suggestions" as to the reasons why American male judges should

have difficulty perceiving the harmful effects of sex discrimination. The initial reason was the judges' lack of knowledge and awareness of the injurious effects of sex discrimination; a lacuna which might be compounded if the judges over-generalized from their personal experiences because those women with whom the judges were in daily contact were likely to appear happy and satisfied.

The American study went on to suggest that even if male judges could understand the harmful effects of sex discrimination, their personal attitudes might deter them from granting the appropriate relief. It is the likelihood that these personal attitudes might consciously or unconsciously intrude that provides the second reason why male judges may lack impartiality in sex equality cases. A person is conditioned to conform to the social role expected of her or his sex. The process starts at birth with the question Is it a girl or boy? It sometimes seems as if the nine months before birth is the only period in which it is really acceptable to ignore the dictates of social sex roles in favour of at least a female/male duality kind of personhood, if not a common status of personhood.

The conditioning process for one sex role is tantamount to rejection of the other sex role for any one person. If the impartiality expected of judges includes empathizing with both parties, then in sex equality cases, judges would be required to fight their own sex role conditioning in order to empathize with female complainants. When the issue concerns not the secondary sex role differences of equal pay and equal opportunity,

but the inherent sex differences of the sexual activity of marriage as in the Lavell case and of pregnancy as in the Bliss case; then the barriers to male judicial empathy may be insurmountable.

A recent study of British and American judicial decision-making entitled Sexism and the Law adopted the approach that

> ...judicial pronouncements about females masked specific and discoverable material interests...[67]

and that such hidden material interests provided a better explanation of the survival of values of masculine supremacy "than the mere cultural inertia suggested by socialization theory".[68]

The specific material interest which caused men to resist equality between the sexes was

> ...an interest in keeping women as head servants at home and keeping them out of the ranks of competitors at work.[69]

The implication of this conflict of material interest explanation (the so-called sex war explanation) for the judiciary is that changing the situation would require more than re-educating the male judges. It would require the appointment of women to the bench, particularly to the Supreme Court of Canada as the court of final appeal, in such numbers that they would be representative of the number of women in Canada.

In the final analysis, changing the composition of the court cannot alter the existence of the precedent cases

inimical to the women's human right to equality. As a general, if not absolute, rule, the Supreme Court considers that it must be guided by its prior decisions when deciding cases. The most reliable way to ensure that the Supreme Court would not consider itself bound by the unsatisfactory equality precedents is to change the wording of the legislation which provides for the women's human right to equality. Since it also can be demonstrated that the existing legislation, the Canadian Bill of Rights equality before the law clause, is inadequate, a change in wording becomes even more necessary if the clause is to have its expected legal impact.

The Supreme Court of Canada has taken the position that the meaning of the equality before the law clause is not self-evident, but requires the intervention of a principle to give it substance. The range of judicial opinions as to the proper principle by which to explain the meaning of the equality before the law clause is wide. At least five principles have been used. This creates uncertainty as to which one, if any, will be decisive in a case. Since too much uncertainty is an anathema to the rule of law, the present clause must be seen as inadequate because it does not give enough guidance to the court. Furthermore, each of the five principles which have been referred to in the equality cases has a serious shortcoming. It would not be constructive to wait and see if the court eventually were able to reduce the uncertainty by selecting one of them.

The two sex equality cases demonstrate the inadequacies of the equality before the law clause. The judicial statements

about equality before the law in the Lavell and Bliss cases make sufficient reference to what was said and decided about the equality before the law clause in the other eight cases to obviate detailed references to the non-sex cases. These cases have very simple fact situations.

Jeannette Lavell was a registered Indian and Band member who had married a non-Indian man. She was married in April, 1970, and on December 7th, 1970, her name was removed from her band's membership list by the Registrar pursuant to section 12(1)(b) of the Indian Act. She protested unsuccessfully to the Registrar and then to the York County Court. In his decision, York County Court Judge B.W. Grossberg said section 12(1)(b) of the Indian Act did not violate the equality before the law clause of the Canadian Bill of Rights because when Jeannette Lavell married she had equality in status with all other married Canadian women.[70] The Federal Court of Appeal[71] recognized the ineptness of the County Court comparison of Indian married women with non-Indian married women and held that the appropriate comparison was between Indian women and Indian men when they married non-Indians. In a unanimous decision of the three man bench, the Federal Court of Appeal ruled that section 12(1)(b) of the Indian Act was inoperative because it offended the Canadian Bill of Rights equality before the law clause since

> ...the consequences of the marriage of an Indian woman to a person who is not an Indian are worse for her than for other Indians who marry non-Indians...[72]

The Attorney General of Canada appealed the Federal Court of Appeal decision to the Supreme Court of Canada.

In Yvonne Bedard's case she had married in 1964 but subsequently returned to the reserve when she separated from her husband in 1970. She lived in a house which her mother had bequeathed to her and which she signed over to her brother. Her brother permitted her to continue living in the house, but the Band Council took action to have her evicted. Yvonne Bedard sought a court injunction to prevent her eviction. After she started the injunction proceeding, her name was removed from the band membership list, despite the fact that she was then separated from her non-Indian husband. Since she was merely separated, she could not qualify under the narrow relieving categories of widow or a woman who had remarried an Indian as contained in section 12(1)(b). In the Ontario Supreme Court decision, Mr. Justice Osler ruled that he was bound by the Federal Court of Appeal decision given two months earlier in Jeannette Lavell's case.[73] In this case it was the defendants, the members of the Six Nations Band Council who appealed to the Supreme Court of Canada.

Since both the Attorney General and the Six Nations Band Council were appealing the decision that section 12(1)(b) was inoperative under the equality before the law clause, the Lavell and Bedard cases were heard together and reported as one decision.[74] Up to the time that the Supreme Court appeal was heard, four of the five judges who had heard these cases had agreed to Jeannette Lavell and Yvonne Bedard's argument that sec-

tion 12(1)(b) was invalid because it created inequality on the basis of sex. In a five to four decision, the Supreme Court of Canada reversed these decisions thereby upholding the validity of section 12(1)(b). One of the five Supreme Court judges, Mr. Justice Pigeon, expressed no opinion on whether section 12(1)(b) created an inequality for Indian women. He said that he was prepared to uphold the validity of section 12(1)(b) because he did not believe that the Canadian Bill of Rights had the power to cause another federal law to be invalid. He had held the same view in Drybones, where he was in a minority. However, in the Lavell and Bedard decision, his opinion provided the majority needed to uphold the validity of section 12(1)(b). The numerical tally in this case underlines the importance of appointing women to the Supreme Court of Canada, where the infamous five prevailed.

The decision also emphasizes the need for a better legislative expression of the women's human right to equality. However, any proposed provision must be drafted to prevent the application of the principles used to deny that inequality existed. One must, therefore, understand those principles.

Mr. Justice Ritchie wrote the majority opinion in the Lavell and Bedard decision. He used what is known as the "rule of law" principle to explain why no inequality was created by section 12(1)(b) of the Indian Act. He derived the "rule of law" principle from the writings of a nineteenth century British constitutional lawyer, Dicey. According to Dicey, the "rule of law" was a fundamental principle of British government and it had three meanings. One of these meanings was "equality before the law or the equal subjection of all classes

to the ordinary law of the land administered by the ordinary courts".[75] Therefore, Mr. Justice Ritchie said:

> ...in my opinion the phrase "equality before the law" as employed in section 1(b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land.[76]

In 1885, Dicey was concerned with denying the claims of officials for privilege or exemption from the ordinary law. However, the claims made by Drybones, Lavell, and Bedard were not claims for exemption. On the contrary, Drybones claimed that he was entitled to be treated the way any intoxicated person who was not an Indian would be treated. Lavell and Bedard did not want to be excluded from the Indian Act; they claimed that s. 12(1)(b) excluded them when they wanted to continue to be included as Indians. Significantly, when Drybones was successful in his claim for inclusion, the "rule of law" principle of equality was never mentioned. This omission suggests that the "rule of law" principle should be confined to cases where an exemption is claimed. According to the Drybones decision, claims for inclusion involve a different principle of equality.[77]

Mr. Justice Ritchie referred to this rule of law principle in his opinion in the Bliss case and again it was inappropriate because Stella Bliss was not claiming an exemption. She argued against her exemption from unemployment insurance benefits. Stella Bliss claimed for ordinary unemployment in-

surance benefits under the Unemployment Insurance Act on the ground that she was capable of and available for work after she had given birth to her child.

The Unemployment Insurance Act provides for payment of three kinds of benefits:[78] ordinary benefits for those who are "capable of and available for" work; sickness benefits payable to those who are incapable of work because of illness, injury, and quarantine; and pregnancy benefits during fourteen weeks of pregnancy. To qualify for pregnancy benefits a woman must have been employed for a longer period than Stella Bliss had been employed, so she did not claim pregnancy benefits. She met the requirements for normal unemployment benefits except for section 46 of the Unemployment Insurance Act which states that during the fourteen week pregnancy benefit period, no pregnant woman may claim other benefits under the Act. When Stella Bliss applied for the normal unemployment benefits, both the Unemployment Insurance Commission and the Board of Referees to whom she appealed dismissed her claim that section 46 of the Unemployment Insurance Act created an inequality on the ground of sex.

She appealed again and Judge J. Collier of the Federal Court of Canada, sitting as Umpire under the Unemployment Insurance Act, supported her argument:

> I do not know the purpose of the legislators in injecting s. 46 into the 1971 legislation. It was suggested that, pre-1971, there was an assumption that women eight weeks before giving birth and

> for six weeks after, were, generally speaking, not capable of nor available for work; this, somehow gave rise to administrative difficulties or abuses; section 46 was enacted to make it quite clear that, in the 14 week period, pregnant women and women who had produced children, were, for the purpose of the statute, not capable of nor available for work, and therefore not entitled to benefits. All that may be. Nevertheless, I am driven to the inescapable conclusion that the impugned section, accidentally perhaps, authorizes discrimination by reason of sex, and as a consequence, abridges the right of equality of all claimants in respect of the Unemployment Insurance legislation.[79]

As in the case of Jeannette Lavell, it was the Attorney General who sought the next appeal to the Federal Court of Appeal. The three-man Federal Court of Appeal reversed Judge Collier's decision and held that section 46 was valid.

Mr. Justice Pratte wrote the decision. He said that the question was "not whether the Respondent has been the victim of discrimination by reason of sex but whether she has been deprived of 'the right to equality before the law' declared by s. 1(b) of the Canadian Bill of Rights".[80] He did not elaborate on his distinction between discrimination and deprivation of the right to equality before the law. However, there was no indication that he subscribed to the view adopted earlier in this paper that equality is the general concept which includes

both nondiscrimination and affirmative action instructions.

Furthermore, Mr. Justice Pratte said, if there was discrimination arising from section 46, it was not discrimination by reason of sex.

> If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.[81]

It seems that he refused to relate pregnancy to being a woman because not all unemployed women were, or even would be, pregnant. But surely it could have been said in the Drybones case that not all Indians would become intoxicated. The issue is not whether all Indians or women are penalized; it is whether only Indians or only women can be penalized.

Having disposed of discrimination on the basis of sex as a way of explaining the equality before the law clause, Mr. Justice Pratte adopted the "relevant distinction" principle to give meaning to the equality before the law clause. According to this principle, statutes make distinctions between individuals. If there is "a logical connection between the basis for the distinction and the consequences that flows from it"[82], the distinction is "relevant". Therefore,

> ...a person could be deprived of his right to equality before the law if he were treated more harshly than others by reasons of an irrelevant distinction made between himself and those other persons. If, however, the difference of treatment were based on a relevant distinction (or, even on a distinction that could be conceived as possibly relevant) the

> right to equality before the law would not be offended.[83]

Recognizing that his principle was not the rule of law principle of Mr. Justice Ritchie in Lavell, Mr. Justice Pratte stated that his own "wider definition" of the equality clause could be used because Mr. Justice Ritchie was not speaking for a majority of the Lavell court (Mr. Justice Pigeon, the "swing" judge, had remained silent about the meaning of equality).

The "relevant distinction", or logical connection, between the basis of the distinction (pregnancy) and the consequences that flow from it (denial of normal unemployment benefits) was twofold for Mr. Justice Pratte. First, he characterized pregnancy as the result of a voluntary act; his unstated implication being that women who became pregnant should bear the cost of any unemployment caused by their pregnancy. Second, he said that "Parliament possibly considered desirable that pregnant women refrain from work for fourteen weeks on the occasion of their confinement".[84] In other words, it was perfectly logical to refuse pregnant women normal unemployment benefits during the "confinement" period because Parliament did not want women to work during that period of time. Either we are to assume that a logical connection is provided whenever Parliament desires something (pregnant women should not work), which in turns renders the principle useless; or Mr. Justice Pratte should have sought and evaluated Parliament's reasons for concluding that women should not work. Since he had already stigmatized pregnancy as voluntary, presumably he would not

have found it difficult to assume that a policy that women should not work during the "confinement" period was for their own good and/or for the good of their co-workers.

The point which must be made is that Mr. Justice Pratte's application of the "relevant distinction" principle produced conclusions which were precisely what such a principle might be expected to produce. The principle rests on an assessment of what is logical or relevant. These are very wide and usually subjective categories. For example, if the state wanted to increase its population by having more babies born, it could justify the imposition of an annual tax on all women, or at least all women of child-bearing age who were not pregnant, on the ground that since only women get pregnant, taxing those who aren't will encourage them to get pregnant.

Since governments can give reasons for virtually all their legislation, the effect of linking inequality to irrelevance is that inequality will be defined out of the courts while still existing in real life. From the standpoint of the individual person, there is no protection against governmental action when inequality is defined in terms of irrelevance. The shocking problem is that the federal government has proposed in its constitutional discussions to do precisely this.

In the Constitutional Amendment Bill, 1978, the federal government sought to improve the equality before the law clause by adding the word "equal" to the "protection of the law" clause such that the two clauses would read "the right of the individual to equality before the law and to the equal protection of the law."[85] Otto Lang, then Minister of Justice, explained that

"equality before the law" could be interpreted by the rule of law principle. Then "equal protection of the law" could mean

> ...that a law cannot apply in a discriminatory manner unless such discrimination is found to be justifiable in the community's interest on the basis of a reasonable classification test. Hence, a law requiring separate restroom facilities for men and women would be a reasonably justified discrimination. On the other hand, a law which denied public access to a park on the basis of colour or language would be found to be unjustifiable discrimination.[86]

That is, by using language similar to that in the United States Bill of Rights, Mr. Lang wanted to tell Canadian courts to adopt the "reasonable classification" principle.[87] "Reasonable classification" is merely another way of expressing what Mr. Justice Pratte meant in Bliss by his "relevant distinction" principle.

Unfortunately, federal Justice Minister Chretien proposed a more perniciously expressed version of this "reasonable/relevant" principle in his July 1980 draft of the Canadian Charter of Rights and Freedoms:

> 7.(1) Everyone has the right to equality before the law and to equal protection of the law without distinction or restriction other than any distinction or restriction provided by law that is fair and reasonable having regard to the object of the law.[88]

How much more clearly can he say that any law which discriminates on the basis of sex, such as section 12(1)(b) of the Indian Act or section 46 of the Unemployment Insurance Commission Act, would be valid if it could be shown to have a reasonable purpose, such as being a mechanism to determine who is eligible for Indian status or being a mechanism to ensure that women are not available for and capable of working shortly after giving birth, respectively.

Insofar as the Supreme Court of Canada is concerned, Mr. Chretien's proposal provides a ready made principle, reasonableness, by which the Court could achieve precisely the same conclusions that it has been drawing from a variety of other principles. Interestingly enough in Lavell, Mr. Justice Ritchie rejected

> ...the equalitarian concept exemplified by the 14th Amendment of the U.S. Constitution as interpreted by the Courts of that country[89]

which means he rejected the "reasonable classification" principle. Mr. Justice Laskin, expressing the view of the four dissenting judges that section 12(1)(b) of the Indian Act did create inequality for Indian women, said that the American cases had

> ...at best a marginal relevance because the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect; and, moreover, I doubt whether discrimination on account of sex, where as here

> it has no biological or physiological rationale, could be sustained as a reasonable classification even if the direction against it was not as explicit as it is in the Canadian Bill of Rights.[90]

Here Mr. Justice Laskin was espousing a third principle, the "prohibited classification" principle, to give meaning to the equality clause. This principle has two possible interpretations. By referring to "prohibited classifications", he may have meant that he preferred the "suspect classification" principle which the American Supreme Court has sporadically and unpredictably engrafted upon the "reasonable classification" principle. Sex has sometimes been given the status of a "suspect classification" and when it has the American Supreme Court has required a state to give a compelling reason, not merely a reasonable reason, for using the male or female classification in the law in question. The "suspect classification" principle was developed to answer the criticism that it was too easy for a government to comply with the "reasonable classification" principle by giving a reasonable purpose and thereby continuing to have discriminatory legislation. If sex were defined so as to remove any doubt that it was a suspect classification, the women's human right to equality would be better protected than under the Canadian federal government's present "reasonableness" proposal. At least the court would be under a duty to declare invalid legislation which created inequality and for which a government could not produce a compelling purpose. However, there is always the danger that the court's assessment of a compelling purpose might continue to be

as superficial as its assessment of reasonableness/relevance.

It is not clear whether Mr. Justice Laskin intended to advocate the American "suspect classification" principle when he referred to the "prohibited classification" principle in Lavell. A second possible meaning for the "prohibited classification" principle is that laws can never use or make distinctions based on the proscribed categories of race, national origin, colour, religion, or sex. Two obvious difficulties arise from such an interpretation of the "prohibited classification" principle. First, it would be impossible to continue to have any kind of Indian Act; and secondly, affirmative action programs geared to minority racial groups or women would be forbidden. There is no indication that Mr. Justice Laskin intended these consequences. Even if he had, affirmative action programs are sufficiently necessary for the women's human right to equality under present social, economic, and political conditions to suggest that this meaning of the "prohibited classification" principle should be rejected.

When Stella Bliss appealed the Federal Court of Appeal decision to the Supreme Court of Canada, she lost there as well. Mr. Justice Ritchie gave judgment for the seven-man court; there was no dissent. It has been suggested that Mr. Justice Laskin would have written a judgment had illness not prevented him from sitting on the case. In his decision, Mr. Justice Ritchie agreed that Mr. Justice Pratte that there was no discrimination based on sex because

> Any inequality between the sexes in this area is not created by legislation but by nature.[91]

By his statement it would appear that Mr. Justice Ritchie was unable to accept the possibility that legislation might compound natural differences. The cumulative impact of the two views, that being pregnant was not relevant to being a woman (Pratte,J.) and that legislation could not affect natural differences (Ritchie, J.), conveys a complete inability to comprehend the impact of legislating with respect to pregnancy.

In the course of his judgment Mr. Justice Ritchie referred to four of the principles which have been used to give meaning to equality, omitting only the "prohibited classification" principle. He applied his own rule of law principle developed in Lavell and held, without further explanation, that section 46 did

> ...not involve denial of equality of treatment in the administration and enforcement of the law before the ordinary courts of the land....[92]

Next, referring to Mr. Justice Pratte's "somewhat different" principle (the relevant distinction), he said, again without further explanation, that he had no doubt that

> ...the period mentioned in s.46 is a relevant one for consideration in determining the conditions entitling pregnant women to benefits under a scheme of unemployment insurance...[93]

It is impossible to know whether the "benefits" referred to as

relevant to the confinement period were pregnancy benefits or normal unemployment benefits. The confinement period was relevant for pregnancy benefits. However, once it was clear that Stella Bliss was not eligible for pregnancy benefits, the confinement period was irrelevant. By blurring this distinction throughout his judgment, Mr. Justice Ritchie created the illusion that pregnancy benefits rather than normal unemployment benefits were in issue.

Unfortunately, as a consequence of his blurred benefits approach, Mr. Justice Ritchie was able to characterize section 46 as part of a legislative scheme to provide "additional benefits". This might have been an appropriate characterization if the provision of pregnancy benefits had been challenged on the ground that such benefits were not available to men.

However, in construing the legislation as beneficial rather than harmful to women, Mr. Justice Ritchie totally ignored the facts before him. Stella Bliss was not eligible for pregnancy benefits; she could not benefit from these "additional benefits". On the contrary, in her case there was no danger of double collection; there was only the reality of section 46 which meant she was disentitled to any benefits. In actual fact she was being treated more harshly.

Mr. Justice Ritchie used the "additional benefits" argument in the context of applying the fourth principle of equality. This is the "worse consequences" or "harsher treatment" principle which he originally applied in his Drybones de-

cision.[94] The dangers of this principle can be illustrated by Mr. Justice Ritchie's own decision in Burnshine.[95] He held that incarcerating a young offender in British Columbia for a longer period than for a similar offender in any other province was not "harsher" treatment because the offender from British Columbia would benefit from the longer incarceration.

Women are as vulnerable to the vicissitudes of paternalism as young offenders. Whether the consequences of specific legislation should be construed as harmful or beneficial depends very much on the perspective of the viewer, as Mr. Justice Ritchie's Burnshine and Bliss opinions well illustrate. Furthermore, while the inequity of legislating harsher consequences for the same activity may be self-evident; the invidiousness of legislating some "benefits" historically has not been acknowledged. For example, legislation forbidding women to work underground in mines "for their protection" actually may have the effect of denying women employment in one industry towns.

Realistically, it is impossible to avoid evaluative terms. This is the inevitable result of seeking a principle which will encompass both the non-discrimination and the affirmative action instructions. To reconcile these instructions some inequalities must be seen as invidious and some as necessary. Therefore, there must be a common evaluation mechanism that both describes and legitimates the reconciliation. Thus far the court has not provided any such explanation for the "worse consequences" principle, or its beneficial corollary; the resulting applica-

tions have appeared arbitrary and sometimes irrational.

The fifth principle of equality is the "valid federal objectives" principle. This principle was first expounded by Mr. Justice Martland in the Burnshine case.[96] According to Mr. Justice Martland

> Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective.[97]

In other words, the "valid federal objective" principle is the old common law division of powers approach that was used in the early twentieth century human rights cases. As applied under the Canadian Bill of Rights, inequality could only exist when the federal government passed a law dealing with a matter assigned to the provinces in the British North America Act. The use of this principle in Bliss enabled Mr. Justice Ritchie to uphold section 46 because he was

> ...of the opinion that section 46 forms an integral part of a valid scheme of legislation enacted by Parliament in discharge of its legislative authority under the British North America Act...[98]

It may be appropriate in a federal system to establish the legislative competence of the enacting government. However, competence and equality are two distinct issues. The "valid federal objective" principle must be supplemented by another principle which can give meaning to the human right to equality.

The analysis of the sex equality cases shows the un-

certainty of the Supreme Court of Canada as to the appropriate principle to give meaning to the equality before the law clause of the Canadian Bill of Rights. The inadequacy of each of the principles has been noted. The court will not be able to alleviate the situation unilaterally. What is needed is a legislative expression which unambiguously speaks both to women and to the courts about the women's human right to equality.

The experience of judicial interpretation of the present sex equality clause shows that any new expression will have to contain at least three components. First, the proscribed classification, women, should be used to emphasize that it is women who have been traditionally, and who continue to be, disadvantaged with respect to the legal status of personhood because of gender. In view of the startling inability of the courts to recognize when a gender classification has been used, it seems to be necessary also to provide that a law would be construed as classifying on the basis of womanhood when only, but not necessarily all, women and no men are included in or excluded from the law in question.

Second, as at present in the Canadian Bill of Rights, equality should remain as the positive value sought. In the federal government's July 1980 draft Charter of Rights and Freedoms for the first time the equality section has been entitled "Non-discrimination Rights". Expressing the generic value negatively could diminish its potential for encompassing both non-discrimination and affirmative action instructions. The negative terminology is neither historically nor logically neces-

sary and should be rejected. Use of the negative terminology is particularly surprising in this draft because for the first time provision has also been made for affirmative action legislation:

> 7.(2) Nothing in this section precludes any programme or activity authorized by or pursuant to law that has as its object the amelioration of conditions of disadvantages persons or groups.[99]

It is difficult to understand why the federal government is not prepared to specify the disadvantaged groups, at least by category such as race or colour; and by classification in the case of women since the category of sex has only two classifications one of which, women, is presently disadvantaged relative to the other. Failure to specify increases uncertainty and the likelihood of expensive and time-consuming litigation. Legislating the disadvantaged status of women in the affirmative action provision would necessitate an amendment when the disadvantaged status is overcome; but a single amendment is a less cumbersome and costly process than the alternative of having to respond to litigated challenges to affirmative action programs.

Furthermore, while section 7(2) legitimates affirmative action legislation under the specified conditions; it does not provide that women, or any other disadvantaged group, could require a government to pass affirmative action legislation. It would be unprecedented for government to place itself in a position where legally it could be forced to enact legislation. Nevertheless, that is a logical consequence of the human right

to equality. The McRuer Royal Commission Inquiry into Civil Rights distinguished rights from freedoms. The freedoms, speech, assembly, religion, press and so on, were characterized as areas of option and opportunity in which individuals were free to act or not without being subject to legal regulation.[100] On the other hand, rights, such as life, property, or equality, were characterized as having "specific and definite obligatory content" and therefore as depending on legal regulation. If the specific obligatory content of the right to equality is "evening-up" the legal positions of disadvantaged groups relative to advantaged groups, then affirmative action legislation should be mandatory and not merely permissive.

The third and most important component is the provision of a new principle which gives meaning to equality in both of its non-discrimination and affirmative action guises. The defect in the American Equal Rights Amendment, which provides "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" is the lack of a legislatively specified principle to give meaning to "equality". If this legislation were to be enacted in Canada, the Supreme Court of Canada would not have to vary its present negative approach to claims for the women's human right to equality. Only if the legislature provides a principle for the interpretation of equality would a change on the part of the Court be required and expected.

There is no indication that any of the present Canadian constitution-makers have raised this issue, let alone tried to

resolve it. There is no reason for leaving the response solely to the courts. Both judges and legislators make decisions which can be labelled "political" in the sense that both types of decisions involve important value choices. The distinction between judicial and legislative decisions lies not in the subject matter but in the process whereby each is expected to arrive at their respective decision. Judges are expected to make decisions based on reasoning from or to principles; legislators are free to use principles, history, intuition, self-interest, public opinion, and so on as the basis for their reasoning. The application of principles in judicial decisions does not mean that judges have a monopoly over the choice of principles which will be used to give meaning to fundamental values. This is particularly so in the case of the women's human right to equality where the judicial record is one of confusion and discord.

If the constitution-makers were to assume the responsibility of providing a principle, it would have to be sufficiently general and flexible that the courts could apply it to the wide range of individual cases which might arise. At the same time, there would be the danger that too much generality and flexibility could invite a repetition of the present process where the unexplained conclusions appear to reflect the inadequacy of the guidelines. To compound these difficulties, it is unlikely that a model principle could be found in any other jurisdiction.

Nevertheless, the inequity of the present situation requires that an effort be made to suggest what the principle

must do. It would then be the task of legislative drafts-persons to convert the proposed policy into effective statutory words. The essential function which the principle must perform is to facilitate the process of "evening-up" the legal status of the disadvantaged group, women, relative to the legal status of the advantaged group, men. There is no simple way to recognize whether equality of legal status has been achieved. Equality is a goal-defining term the end product of which can only be described by words of relativity, such as "evening-up". However, what is significant about equality is that it is a positive goal to be sought, hence necessitating both the non-discrimination and affirmative action instructions. Put quite simply, the process of "evening-up" the legal status of a disadvantaged group relative to an advantaged group means that laws must not classify on the basis of the characteristic of the disadvantaged group, unless that disadvantaged group (not the courts, not the advantaged group, and not the government) is prepared to agree that such classification is necessary for this process. The final point to be made about the choice of a new principle to infuse meaning into the women's human right to equality is that there must always be a "law", whether legislative or judicial and whether as worded or as applied, which serves as the mechanism for triggering a claim for the women's human right to equality. On the other hand, questions in the future about the impact of a law, about whether women remain disadvantaged, about affirmative action programs, ultimately must depend for answers on the factual position of women in society as persons who work, marry,

bear children, and so on. That factual position will reflect and guide their legal status, a circularity of life and law that is unescapable. As such, a caveat about the purpose of equality law is germane. It is foolish and unacceptable to expect that the purpose of equality law is sameness in the sense that individual differences and structural hierarchies would be abolished. Insofar as equality law would affect our lives in an ultimately equalitarian society, it should be through the neutralization of legal, not individual, differences.

If, and only if, the constitution-makers agree to legislate an equality clause which is sufficiently detailed that it conveys to the judges a meaning for equality which corresponds to women's expectations; then the question of whether to entrench human rights in the constitution becomes pertinent. First, entrenching human rights in the constitution, rather than leaving them in an ordinary law like the Canadian Bill of Rights, is seen as providing more protection for individual claimants because the courts will treat a constitutional law as more important and therefore as more binding. If what is being discussed is entrenching the present clause, or a variant thereon, the effect of entrenchment would do nothing whatsoever to change the present negative response of the courts to women's claims for equality. The record in Lavell and Bliss makes this clear. Of all the Supreme Court of Canada judges who sat on these two cases, only one, Mr. Justice Pigeon in Lavell, based his decision on the conclusion that the wording of the Canadian Bill of Rights, did not have the effect of overruling or invalidating another

federal statute. No other judge was prepared to limit the effect of the Canadian Bill of Rights to the provision of a canon of construction rather than of invalidation. Every other judge who rejected the claims of Jeannette Lavell, Yvonne Bedard, and Stella Bliss, did so because he did not believe that any inequality was created by the laws in question. It is obvious that the courts are prepared to accept the binding nature of the present law; entrenchment to increase the binding nature of human rights claims is superfluous. It may be appropriate, as Walter Tarnopolsky has suggested,[101] to improve the terminology of the invalidation section, but as an ordinary law it was sufficiently binding to produce the Drybones decision.

The second reason for entrenchment, the achievement of uniform fundamental human rights legislation throughout Canada, is a good reason for supporting entrenchment given the present gaps in coverage. It has already been pointed out that only the federal and Alberta governments have legislated about the human right to equality. Human rights are so important that their existence should not be left to the vicissitudes of local politics. Some of the provinces have tried to argue that local conditions justify locally defined human rights. This argument ignores the generality with which human rights must be expressed in order to cover the myriad of fact situations which may arise. It is this very generality which protects people under and where necessary, from, local conditions.

The more important argument against entrenchment has been expressed in terms of the inappropriateness of giving

the courts the final say in human rights questions. In view of the courts' past record, women may have considerable sympathy with this view. Governments should be responsible for passing human rights laws of general application. On the other hand, it does not make any sense to ask a government to act as judge in a conflict in which it is one of the parties to the action. Resort to court adjudication will always be a part of the process of protecting human rights. However, even with entrenched human rights the legislature has the final say.[102] Entrenchment only makes changing the entrenched provisions more difficult, but not impossible. Walter Tarnopolsky has suggested that no government would find it politically feasible to repeal or amend any provisions of the present Canadian Bill of Rights.[103]

In conclusion, the argument for uniformity of protection is the one which compels women to support entrenchment, given the present gaps in protection. The present constitutional negotiations hold out the only possibility for uniformity and that appears in the guise of federal proposals for entrenchment of human rights. There are no serious disadvantages to entrenchment for women, save one -- that of continuing to use the equality before the law clause. If the constitution-makers were to propose a clause which provided for the women's human right to equality in words that the Supreme Court of Canada could not emasculate, entrenchment would be appropriate. The appointment of women to the Supreme Court of Canada bench would provide the balanced perspective currently lacking when women's claims to equality are adjudicated.

Footnotes

1. Canadian Bill of Rights, R.S.C. 1970, Appendix III.

2. Alberta Bill of Rights, S.A. 1972, c. 1.

3. Charter of Human Rights and Freedoms, R.S.Q. 1977, c-12.

4. The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.

5. This right also includes freedom from arbitrary arrest, the right not to receive cruel or unusual punishment, the right to be informed of the reasons for arrest, the right to retain counsel, the right of habeas corpus, the right not to be compelled to give evidence under certain circumstances, the right to a fair hearing, the right to be presumed innocent until proven guilty, the right to make reasonable bail except for just cause, and the right to an interpreter.

6. Manitoba Law Reform Commission, The Case for a Provincial Bill of Rights, 1976, Appendix A, p. 61.

7. Language rights presently are found in the British North America Act, s. 133, rather than in the Canadian Bill of Rights.

8. Canada, Royal Commission on the Status of Women, Report, Ottawa, 1970, p. xi.

9. The King v. Alice Stubbs and others (1788), 2 T.R. 395.

10. The Queen v. Crosthwaite (1867), 17 Ir. Com. L.R. 463.
Chorlton v. Lings (1868), L.R. 4 C.P. 374.
The Queen v. Harrald (1872), L.R. 7 Q.B. 361.
Nairn v. University of St. Andrews, [1909] A.C. 147.

11. Beresford-Hope v. Lady Sandhurst (1889), 23 Q.B.D. 79.
De Souza v. Cobden [1891] 1 Q.B. 687.
Viscountess Rhondda's Claim, [1922] 2 A.C. 339.

12. Bebb v. The Law Society, [1914] 1 Ch. D. 286.
Hall v. Incorp. Society of Law Agents (1901), 38 Scot. L.R. 776.
Cave v. Benchers of Gray's Inn (1903) The Times, Dec. 3.

13. Chorlton v. Lings, op. cit., 388.

14. Jex-Blake v. Senatus of University of Edinburgh (1873), 11 M. 784.

15. In Re Mabel P. French (1905), 37 N.B.R. 359.
Re Mabel French (1912), 1 D.L.R. 80.
Dame Langstaff v. The Bar of Quebec (1915), 47 C.S. 131.

16. R. v. Cyr (1917), 2 W.W.R. 1185, appealed [1917] 38 D.L.R. 601.

17. Ibid., 611.

18. In the Matter of a Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867, [1928] S.C.R. 276.

19. Edwards and others v. Attorney-General for Canada, [1930] A.C. 124.

20. M.E. Ritchie, "Alice Through the Statutes" (1975), 21 McGill L.J. 685, 701-2. See also G. Brent, "The Development of the Law Relating to the Participation of Canadian Women in Public Life" (1975), 25 U. of T.L.J. 358, 368-370.

21. Union Colliery Company of B.C. Ltd. v. Bryden, [1899] A.C. 580.

22. Cunningham and A-G for B.C. v. Tomey Homma and A.G. for Canada, [1903] A.C. 151.

23. Ibid., 155-6.

24. Quong-Wing v. The King, [1914] 49 S.C.R. 440.

25. Christie v. The York Corporation, [1940] S.C.R. 139.

26. Noble and Wolf v. Alley, [1951] S.C.R. 64.

27. Bhadauria v. Seneca C.A.A.T. (1980), 27 O.R. (2d) 142.

28. Section 10 of the Quebec Charter provides: Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, etc. There has been no jurisprudence as to whether s. 10 applies to legislation or only to private activity.

29. Re Ontario Human Rights Commission et al. and Ontario Rural Softball Association (1980), 26 O.R. (2d) 134. See also Re Cummings and Ontario Minor Hockey Association (1980), 26 O.R. (2d) 7, decided at the same time but on the technicality that the O.M.H.A. was not an incorporated entity and therefore could not be sued as a "person" under the Ontario Human Rights Code, section 2.

30. Bloedel v. University of Calgary, unreported, Board of Inquiry, Jan. 30, 1980.

31. The Athabasca Tribal Council v. Amoco Canada Petroleum Company Ltd. et al. unreported decision, Alberta Court of Appeal, April 30, 1980. (Under appeal to the Supreme Court of Canada.)

32. Ibid.

33. The Individual's Rights Protection Act, S.A. 1972, c. 2.

34. The Newfoundland Human Rights Code, R.S.N. 1970, c. 262, as amended.

35. Supra, n. 3.

36. An Act to Amend The Individual's Rights Protection Act, Bill 201, 2nd session, 19th Legislature, 29 Eliz. II, s. 2.

37. Human Rights Code of British Columbia, S.B.C. 1973, C. 119, as amended, s. 11(5).

38. The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 47(3).

39. Human Rights Code, R.S.N.B. 1973, c. H-11, as amended, s. 13(3).

40. Human Rights Act, S.P.E.I. 1975, c. 72, as amended, s. 19.

41. Human Rights Act, S.N.S., c. H-24, as amended, s. 19.

42. Canadian Human Rights Act, 25-26 Eliz. II, c. 33, s. 15(1).

43. The Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended.

44. Saskatchewan, Manitoba, and Canada.

45. Supra, n. 27.

46. Hereafter called the equality clause.

47. See M. Eberts, Women & Constitutional Renewal, supra, p. 18.

48. M. Eberts, "The Rights of Women" in MacDonald and Humphrey, The Practice of Freedom, 1979, Butterworths, 237.

49. Attorney-General of Canada v. Lavell, Isaac v. Bedard (1973), 38 D.L.R. (3d) 481. (The Supreme Court of Canada issued one decision which included both of these cases, so I shall treat them as one decision.)

50. Bliss v. Attorney-General of Canada (1978), 23 N.R. 527.

51. R. v. Drybones (1970), 9 D.L.R. (3d) 473.

52. Attorney-General of Canada v. Canard et. al. (1975), 52 D.L.R. (3d) 548.

53. R. v. Smythe (1971), 19 D.L.R. (3d) 480.

54. Curr v. The Queen (1972), 26 D.L.R. (3d) 603.

55. R. v. Burnshine (1974), 44 D.L.R. (3d) 584.

56. Prata v. Ministry of Manpower and Immigration (1975), 52 D.L.R. (3d) 383.

57. Morgentaler v. The Queen (1975), 53 D.L.R. (3d) 161.

58. R. v. Hatchwell, [1976] 1 S.C.R. 39.

59. Supra, n. 51.

60. Supra, n. 8, p. 342.

61. Constitutional Amendment Bill, 1978, s. 104.

62. P. Weiler, In The Last Resort, 1974, Carswell/Methuen, p. 22.

63. J.D. Johnston, Jr., and C.L. Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective" (1971), 46 N.Y.U.L.R. 675.

64. Ibid., 676.

65. Ibid.

66. Ibid.

67. A. Sachs, and J.H. Wilson, Sexism and the Law, 1978, The Free Press, p. 8.

68. Ibid., 9.

69. Ibid., 11.

70. Re Lavell and A-G. Canada (1972), 22 D.L.R. (3d) 182.

71. Re Lavell and A-G. Canada (1972), 22 D.L.R. (3d) 188.

72. Ibid., 193.

73. Bedard v. Isaac et al. (1972), 22 D.L.R. (3d) 188.

74. Supra, n. 49.

75. Ibid., 495.

76. Ibid.

77. Discussed in text accompanying n. 94.

78. Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 17, 25 and 30.

79. Bliss v. A.G. Canada (1977), 16 N.R. 254, 257.

80. Ibid., 258.

81. Ibid.

82. Ibid., 259.

83. Ibid., 260.

84. Ibid., 261.

85. Constitutional Amendment Bill, 1978, s. 6.

86. O. Lang, Constitutional Reform: Canadian Charter of Rights and Freedoms, Canada, 1978, p. 8.

87. Also known as the "reasonable relationship" or "reasonableness" or "rational basis" principle.

88. This section became section 15(1) in the Constitution Bill, 1980 which was put before Parliament. Section 15(1) reads: "Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex." There is no reference to the "reasonable/relevant" principle in s. 15(1); however the same effect is achieved by providing in s. 1 that: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government".

89. Supra, n. 49, 494. He said that the "equality before the law" clause did not evoke the American principle. This left open the question whether adoption of the American "equal protection of the law" terminology would cause the Supreme Court of Canada to adopt the American jurisprudence. Mr. Justice Laskin's rejection of the "reasonable classification" principle (see text, n. 90) was more categorical.

90. Ibid., 510.

91. Supra, n. 50, p. 534.

92. Ibid., 535.

93. Ibid., 536.

94. Supra, n. 51. This principle was also applied in Lavell by the Federal Court of Appeal and resulted in s. 12(1)(b) being declared inoperative, a finding which the Supreme Court of Canada later reversed using the rule of law principle. See text accompanying n. 72.

95. Supra, n. 55.

96. Ibid.

97. As reported by Mr. Justice Martland in Prata v. Min. of Manpower and Immigration (1975), 3 N.R. 484,490, citing Burnshine.

98. Supra, n. 50, p. 537.

99. Included in the proposed Constitution Bill, 1980 as s. 15(2) which reads: "This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups".

100. Ontario. Royal Commission Inquiry into Civil Rights, Report, Vol. 4, No. 2, c. 102, p. 1493.

101. W. Tarnopolsky, "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada", Law Society of Upper Canada, Special Lectures on The Constitution, 1978, p. 161, 193.

102. Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada", [1975] 53 C.B.R. 469, 479. According to Mr. Justice Laskin "On constitutional issues, issues concerning the division or distribution of legislative power, the courts, and ultimately the Supreme Court of Canada, have the final word (subject to constitutional amendment)."

103. Supra, n. 101, p. 165.